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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 329

THE UNITED STATES OF AMERICA, *Petitioner*,

vs.

JOHN J. GILES

BRIEF FOR RESPONDENT

NAT L. HARDY,
WILL A. MORRISS,
of San Antonio, Texas,
Attorneys for Respondent.

THE STANDARD PRESS, INC., San Antonio

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CORRECTING PETITIONER'S STATEMENT

The entries charged to have been made by respondent were not made by him. He did not cause them to be made. They were not made by his direction. They were not made by anyone over whom he had authority, direction or control, nor with whom he had contact. They were not made in his presence, actual or constructive. He did not aid, abet, counsel, command, induce nor procure the making of them, nor either of them. They

were not made pursuant to any conspiracy, express or implied, between him and the entrants. He was not cognizant of the making of the entries, when made. He took no step to induce the making of the entries. Nothing *he* did *caused* the entries, nor *any* entry, *to be* made. They were not made as a result, nor in consequence, of any act of his, but were made, rather, by bookkeepers acting independently of him, as a result, and in consequence, of withdrawals on that day from, and deposits in, the customers' accounts,—of checks drawn on, and paid out of, and hence deducted from, the accounts, thus reducing the "old balances", and of other deposits than those in question made in one of the accounts, thus augmenting it.[1] The withholding of the deposit slips, therefore, occasioned no entry, the entries having been made by the respective bookkeepers in consequence of withdrawals and deposits in the one account, and withdrawals in the other, of which withdrawals and deposits so causing the entries in question it is not alleged, nor shown, nor claimed, respondent had knowledge. The entries in question were

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1. See R. 19, Ex. 4, which shows the "old balance" in the Public Service Company account was reduced $284.09 by ten checks charged to and augmented $2585.15 by two deposits in, that account, thus occasioning the entry of the new balance of $7874.07 (the entry charged in third count, R. 4), instead of the old balance of $5573.01. See, similarly, R. 20, Ex. 5, account of Insurance Company, where five checks, amounting to $278.41, were drawn against that account, thus occasioning the new balance entry of $1199.66 (charged in fourth count, R. 5) instead of the "old balance" of $1478.07, at the beginning of the day. The exhibits show, what is common knowledge, that no new balance is struck, hence no entry made, on days when no change occurs in last previous balance.

made, respectively, by two of the bank's bookkeepers,—one who kept the individual ledger sheets including the letter "N", and hence made the entries in the account of National Life and Accident Insurance Company, and the other who kept the "S" sheets, including San Antonio Public Service Company account. (R. 18).

As conceded in the Petition, p. 4, and Petitioner's brief, P. 51, "there is no dispute as to the facts". As was correctly stated by Petitioner in its Bill of Particulars (R. 19), in relation to each false entry count, "the *act committed* by defendant - - was the *withholding* by him and the *failure* by him *to turn over* to the Bookkeeping Department in the usual course of the bank's business, a deposit slip"—though it was there erroneously concluded this act of omission "caused" the entries to be made,—which it did not.

Respondent was one of three paying and receiving tellers for the bank (R. 22). On July 25, 1933, as such teller, he received a deposit of $1985.79 by San Antonio Public Service Company (R. 13), and a deposit of $663.37 by National Life & Accident Insurance Company (R. 15). He correctly turned the proceeds into the cash drawer.

He made the correct entries in the customers' pass books. Instead, however, of placing these two deposit slips in a drawer, whence, as was the custom, persons from the bookkeeping department of the bank would get them and convey them to the bookkeepers, respondent placed these two slips in a cigar box on top his desk, wherein he kept odds and ends, expecting to place them at a later date

in the drawer from which they would be conveyed to the bookkeepers. (R. 53-54,59).

The foregoing comprehends the whole of respondent's acts in relation to the transaction.[1]

The reason why respondent placed the two deposit slips in his cigar box, and omitted to place them in the drawer from whence they should be conveyed to the bookkeepers, was that his cash was short by approximately the sum of these two deposits, and by withholding, but only by withholding, these two slips he could balance his cash. (R. 54).

While unnecessary to the point to be decided, the shortage in his cash was not due to any fault of respondent.

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1. Respondent testified, without dispute (R. 53-54):

"The bank got the money for both of those deposits. I did not make any false entries with reference to those items. It is true that all I did was simply put the deposit slips in the cigar box and withhold them for the time being, until I could recover the shortage. I did not make any report to any bookkeeper or anything of the kind, nothing to report to the bookkeeper. As to how the bookkeeping department received its information on which they keep their books, the bookkeepers came in three or four times a day and lots of days oftener, and took the deposit tickets and checks out of the drawers. The business of the day was represented by the tickets and checks. I would put those in the drawers; I had a special drawer for them, divided into sections. As to whether I took them to the bookkeepers or they came to the drawers whenever they wanted to get them,—they came and got them whether I was there or not. I had no control

The first two counts charged him with embezzlement of the sum of these two deposits (R. 1-3), but the shortage was explained, without dispute, to have occurred through successive instances of packages of bills having been taken from his cash without his knowledge or connivance, and, fearing to lose his job, he committed the blunder of deciding not to report the loss, but to cover the shortages by temporarily withholding, from time to time, the deposit slips of customers until he could either recover the missing cash or make good the shortage (R. 47). Following shortly the two deposits in question, the bank failed, and he thereupon reported the fact of the shortage and paid it in full,—in part borrowing from relatives with which to do so and selling his home to pay the balance (R. 48-49). In brief, by the undisputed facts, respondent was not at fault in relation to the shortages; and the jury acquitted him of

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or direction whatever over the bookkeeping department or any bookkeeper. - - If the entries were made on any given date showing the balance of any depositors, etc., I did not have anything whatever to do with making the entries, or causing them to be made. They simply came to the drawers and got the checks and deposit slips, and from that made up their entries.

"These two deposit slips that were withheld and stuck in the cigar box that day would have gone right on into the books in time if the bank had not closed. * * * They were simply withheld that way to make my cash balance, that was the only way I had of doing that" (R. 60): "I did not make any entries or figures of any sort from which the bookkeepers might have got it off the entries. The only entry I ever made was in the depositor's pass book. I therefore made no other entries."

the charges of embezzlement, but, required by the court's charge[1], convicted on the false entry counts (R. 73).

SUMMARY OF ARGUMENT FOR RESPONDENT

The law of the case, as counsel for respondent conceive it to be, is:

1. The facts fail to sustain Petitioner's claim that respondent "caused" the entries to be made. *Per contra*, they were made independently of him, and of, but despite, his act in withholding the deposit slips. They were made as part of the system, and routine, in consequence of changes in the "old balances" in the respective accounts of Public Service Company, and Insurance Company, due to withdrawals and additions (checks drawn on both accounts and deposits in the one); and both entries would have been made had Giles not received, nor withheld, the deposits. Nothing Giles did caused the entries to be made. The most to be said is that what Giles did may, through sequent circumstances, have *contributed* to the falsity of the entries, as thus made independently of him; but he did not *cause* the making. His act is not covered by the statute, which penalizes only him "who *makes* any false entry". —and the rules for construction do not admit of such extension of the plain words of the statute as would be

1. The Court charged (R. 67):

> "If the defendant - - by concealing or suppressing deposit slips - - with knowledge - - that by his affirmative act in so concealing these deposit slips he would cause the bookkeeper to make an erroneous and false entry - - then you would be warranted in finding that he caused the false entry."

required for inclusion of his undisputed act of withholding the deposit slips.

2. Since Giles did not make the entries, nor cause them to be made, but they were made independently of and without regard to him or to his act in withholding the slips, he was not principal to the making, neither as having aided, abetted, counseled, commanded, induced nor procured the making, nor under the "innocent agent" doctrine; and since the *making* of false entries, and *not* the *causing to be false* of entries independently made by others, is the thing the statute, by unambiguous language, penalizes, Giles' act is not within the statute.

3. One who does not himself make the entry may not, under the statute—which punishes only him "who makes any false entry"—be convicted except he be principal with him who made it. No doctrine known to our law, other than the *law of principals*, warrants conviction of one for an offense actually committed by another; and respondent was not such principal.

4. The "innocent agent" doctrine, being but part of the law of principals, may not be so far extended as to make penal under this plain statute an act or omission on part of accused which, at most, but contributes to, or causes, the *falsity* of the entry, but to the *making* of which accused was not principal. Neither will the "omission to prevent a foreseen consequence" theory avail to uphold conviction.

5. The "well recognized principle of intended causation", sought to be applied by Petitioner, while recognized as the true principle on which criminal responsibility rests,

is nothing more than a recognition of the law of principals, and does not extend, but is limited by, that law; and barest recital of the undisputed facts demonstrates there was no "causation", intended or otherwise, of the "making of any entry" in respondent's withholding the deposit slips.

6. The Circuit Court of Appeals for the Fifth Circuit was right in reversing the judgment.

DISCUSSION

The first, and fundamental, fault with Petitioner's argument is factual,—it erroneously assumes respondent "caused" the *entries* in question *to be made*. The facts do not justify, but repel, the assumption.

Giles, as teller, received two deposits by regular customers, but, instead of depositing the two slips evidencing the deposits in the drawer from whence the bookkeepers would receive and record them, withheld them. That is the sum total of his acts in relation to the matter under inquiry.

In consequence, the bookkeepers failed to receive these evidences of the two deposits. Instead of this causing them to make entries, it would have obviated any entry by them. His act, so far from *causing* entry, had just the opposite purpose and effect,—it prevented entry relating to the transactions he dealt with. If this were all, the "old entries" might have stood indefinitely,—at least until Giles should turn in the withheld slips, and they should thence reach the respective bookkeepers. However, other causes intervened, requiring entries. The Public Service Company drew ten checks against its account, which came in and were paid, reducing their "old balance" by an aggregate of

$284.09. It also made other deposits (other than and distinct from that which Giles withheld) amounting to $2585.15. Thus, by acts of this depositor, separate and distinct from the act with which Giles was concerned, the "old balance" of $5573.01, which remained to that depositor at the end of July 24, was augmented by other deposits on the 25th amounting to $2585.15, and reduced by checks amounting to $284.09; and this necessitated a new balance entry at the close of the business day of July 25, in that account. So, taking the balance of the previous day, adding to it the two deposits which came to him from the customer on that day, and deducting the withdrawals, the bookkeeper of that account made the entry in question, of $7874.07. There is neither evidence nor intimation that Giles was concerned in or knew aught of this,—of either the deposits, or withdrawals, or entries. By the same process, as part of the same systematic routine, and as a result of the day's withdrawals in the account of National Life & Accident Insurance Company, deducting the aggregate of checks charged against that account that day, the bookkeeper working on that sheet of the ledger made the entry in question in that account,—Giles having nothing to do with the withdrawals nor resultant entry.

Had there been no withdrawals in the last mentioned account, and no checks on nor deposits in the former, neither new entry would have been necessitated, nor made. But for these resultant changes in the balances of these two respective depositors, occasioned by withdrawals and deposits, all wholly independent of anything Giles did, neither entry would have been made. The balances otherwise would have stood as of the day previous. The "old balances" of July 24 might have remained without change, and no new entries made, for indefinite period, but for

these acts, by way of withdrawal and deposit, on part of the respective depositors. Otherwise, these old balances, these identical entries, might have remained until the bank closed and no entries made after July 24. Had it continued business, they might have remained until they became dead accounts, and the sheets removed thereto. This is not only indicated by the ledger sheets themselves, but is matter of most common knowledge. New entries are not made in existing depositor's accounts until and unless a change occurs in the account, by depletion or augmentation, necessitating the change. But by these independent and subsequent, intervening acts, in each instance, the changes were necessitated, and the new entries made. Did Giles cause these new entries? Did Giles cause the depositors to make withdrawals, or the one to make deposits,—wholly independent of the slips which he withheld? Did Giles even know of these extraneous withdrawals and deposits? Does allegation or proof indicate any such knowledge by, or notice to, him? How, then, could he have "caused" the new entries, which were made entirely independently of his act in withholding the slips evidencing the deposits he received? How was he to know that, before he should turn in the two slips he temporarily withheld, independent, intervening acts should be done by the depositors themselves, which should change their balances, and that in consequence the entrants, the bookkeepers, should make new entries? Is it not, therefore, plain, beyond cavil or controversy, that Giles' withholding the evidence of deposits he had received did *not* cause the entries in question, but that they were caused in consequence of the intervening acts of depositors themselves,—the one in making other deposits, and both in making withdrawals?

The matter can be reduced to simplest understanding by the following parallel:

A and B are tellers in the bank, C a depositing customer. At the beginning of today's business C has on deposit $500.00,—his "old balance". On this morning C deposits through A, $100.00. A accepts the deposit and places the $100.00 entry in C's pass book; and puts the $100.00 into the drawer with his cash, but instead of putting the deposit slip into the drawer where the bookkeepers would get it, A withholds the deposit slip,—puts it in his pocket. Now, this withholding, of course, causes no entry by the bookkeeper. To the contrary it *prevents* an entry: because the bookkeeper, not having the information to the effect that C's balance has been changed, will let the old balance entry stand. If this were all, the "old balance" would stand indefinitely. But C, by other and independent acts, does cause a new entry. That is, later in the day he goes to B, the second teller, and presents his check for $50.00, thus depleting his balance by that sum. We will say, too, that still later in the day C goes back again to B, and deposits $500.00, thus augmenting his account by that sum. B reports the two transactions to the bookkeeping department. In consequence of the withdrawal and deposit through B, D (a bookkeeper handling that account) thereupon records the $50.00 withdrawal, and the $500.00 deposit, and enters, as C's new balance, $950.00, thus making the new entry.

If we know anything of cause and effect—"the well recognized principle of intended causation"—we know that what caused this new entry were C's withdrawal and deposit through B, the transmission of the fact to D, and D's figuring up and doing his duty of making the new balance entry accordingly,—in none of which A had a part. We know that A's withholding the $100.00 slip *did not cause the making* of the new balance entry. The *very*

most which may be said of A's withholding the $100.00 deposit slip is that, in consequence of it, D's entry did not reflect the true amount of obligation of the bank to C, and, therefore, that A's act, in the sequence of events, *resulted* in the *falsity* of D's entry—even if that much may be said; *but it did not cause D* to *make* the entry.

This false factual assumption on the part of Petitioner that Giles "caused the making of the false entries" lies at the base of counsel's whole argument. With this error exposed, nothing remains to Petitioner.

Neither is it true, as the above example illustrates, that Giles "knew that false entries would result" from his withholding the deposit slips. What did he know of the checks against the account?—or the other deposits in the one? Certainly no proof indicates such knowledge; and if that knowledge is to be argued against him, it ought to have been proved. It is certainly not inferable from the circumstances in evidence. All that is shown is that during the day, additionally to the two deposits made through Giles, the two depositors depleted their balances by checks and one of them added to its by other deposits. There is no indication Giles handled any such checks or deposits, or knew aught of them. He was only one of at least three receiving and paying tellers. We cannot *presume* he knew that these depositors, or either of them, would in the interim draw against their account, or make other deposits, before he should report the deposits made to him, or that he knew they had done so on the day in question. This would be to presume, without proof, against him, rather than in his favor. So, if that be important, it is not true to say he knew even that the entries would result.

But even if we might suppose, or presume, Giles did know the withdrawals, or deposits, or both, would occur, or had occurred; and suppose further he knew false entry by the bookkeeper would result,—that still is not sufficient.

> "The mere concealment of the knowledge that a felony is to be committed, however, will not make the party concealing it an accessory before the fact; nor will a tacit acquiescence, or words which amount to a bare permission, be sufficient to constitute this offense." Wharton, Hom. (3 Ed.) p. 76; Smith vs. State, 41 Ohio App. 64; Lewis vs. State, 119 Tex. Crim. Rep. 265;

It of course cannot avail to say respondent knew, or should have known, that in consequence of his withholding the slips the entries might or would be made by the bookkeeper,—that *would not make him principal*, but would be to impute to him criminal responsibility for the innocent, subsequent, independent act of another, in his absence, which he did not cause nor direct, and which this statute does not cover, and no rule of construction admits.

Familiar as is this Court with the rules for construction of penal statutes, it will not be amiss, at the outset of the inquiry whether the act of Giles is within the statute which punishes him, and him only, who "makes any false entry", to have before us an expression of those fundamental rules:

Mr. Bishop, in his Statutory Crimes, (3 Ed.) Secs. 191-194, 199b-220, reminds us (Sec. 191) our courts are not justified in interpreting *what needs no* interpretation. He next well says (Sec. 192) that the law itself deems such penal statutes

> "odious, not as being unnecessary, but in the sense in which a father feels it odious to inflict needful chastisement on a child; and, on the other hand, there are things in which the law delights. To things odious is applied the strict interpretation; to things favored, the liberal: as a father, in chastising his child, would keep within the necessity of the case to the letter; while, in bestowing a merited reward, he would cast in something also from affection".

And (Sec. 196) that

> "While the parts of a penal statute which subject to punishment, or a penalty are, from their odious nature to be construed strictly, those which exempt from penal consequences will, because of their opposite character, receive a liberal interpretation".

Then, under his rules for construction, he says (Sec. 216):

> "The words of a penal or other statute requiring a strict construction must not be extended beyond what they will fairly and reasonably bear."

And, (Sec. 218) as his 5th rule,

> "If, in a criminal case requiring the strict construction of a statute, the court entertains a reasonable doubt of its meaning, this doubt will prevail in favor of the accused".

And, as his 6th rule (sec. 220):

> "In strict construction, no case is brought within the statute unless completely within its words".

These rules of construction are recognized, we think, without exception, by this Court.

United States vs. Sheldon, 2 Wheat. 119, 121;
United States vs. Wiltberger, 5 Wheat. 76, 96;
United States vs. Brewer, 139 U. S. 278;
United States vs. Weitzel, 246 U. S. 533;
United States vs. Noveck, 271 U. S. 201, 204;
Fasulo vs. United States, 272 U. S. 620, 628-629;
Prussian vs. United States, 282 U. S. 675, 677;
United States vs. Scharton, 285 U. S. 518, 521-522;

Cases might be multiplied. Briefest composite expression of the rules applied in those decisions, cited supra, may be said to be:

> "Familar rules require that these criminal statutes shall be construed strictly". "It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of the statute is within its provisions, so far as to punish a crime not enumerated in the statute because it is of equal atrocity or of a kindred character with those which are enumerated". "Laws which create crime ought to be so explicit that a man subject to their penalties may know what acts it is their duty to avoid". "Before a man can be punished his case must be plainly and unmistakably within the statute". "Words may not be extended beyond their natural meaning in order to create an offense by construction merely". "If there has been a failure to provide for the state of case developed by the record, Congress alone can supply the omission". "A strained construction is inadmissible". "Statutes will not be read to create crimes or degrees or classes of crimes, unless the purpose so to do is plain". "There are no constructive offenses. Before one can be punished, his case must be unmistakably within the statute".

Expressions of like import might, too, be multiplied.

In Cochran v. United States, 157 U. S. 287, in considering this statute, this court correctly said "*the penalty is affixed to the false entry*". Plainly, this is so; for the statute, in plain language, levels its penalty at him "*who makes*" the false entry. That is, one, before he may be punished, must either have *made* the entry, or be *party* to its actual *making* in such way as that the application of some known principle of law makes him answerable for it. And here we make bold to assert there is no known principle or doctrine of law under which one may be found guilty of a crime he did not himself actually commit, save the law of principals. (We mean to include a conspirator as a principal; but there is, of course, no conspiracy in the case being considered. We, of course, include accessories and accomplices as within the law of principals, as our Federal statute, Act of Congress, Mar. 4, 1909, c. 321, Sec. 332, 35 Stat. 1152, U. S. C. Title 18, Sec. 550) abolishes the distinction and makes all guilty participants principals. We treat too, the "innocent agent" doctrine as part of the law of principals).

Aside from the "innocent agent" doctrine, there is no such thing as "criminal agency". It is a misnomer. It does not exist. It "connotes" nothing, but a failure to understand the law of principals.

In 1 Clark & Skyles, Law of Agency, Sec. 520, "Criminal Liability of Principal for Agent's Acts" it was early said:

> "The true ground of the principal's liability, in those cases where he is held criminally responsible for the acts of his agent, is not because of the relation of principal and agent, for as has been seen in an earlier part of this work, an agency can not be created for the

purpose of committing illegal or criminal acts, but is on the ground that the principal in the particular case is a principal or accessory to the crime by in some way being privy to or participating in it. As has been said: 'strictly speaking, the legal relation of principal and agent does not exist in regard to the commission of criminal offenses. All who participate in the commission of such offenses are either principals or accessories' ".

2. C. J. S. Agency Sec. 12: "One cannot be an agent in the commission of a crime - - There can be no agency in the perpetration of a crime, misdemeanor, or any unlawful act, and all parties participating therein are principals".

Cf. 1 McLain, Crim Law, Sec. 188.

U.S.C.Title 18, Sec. 550, says: "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal".

In 43 Harvard Law Review 689, Sayre, in his article on "Criminal Responsibility for the Acts of Another" (dealing with the development of the civil doctrine of respondeat superior, and the criminal law concept of vicarious responsibility) said (P. 719):

"Criminal liability in the case of all true crimes should be based exclusively upon causation (P. 723). Criminal liability, being essentially personal and individual, has always depended upon proof of individual causation. Hence the criminal law has never accepted the doctrine of respondeat superior, which is a form of liability without fault and outside the ordinary principles of causation".

He quotes (P. 700), from Rex vs. Huggins, 2 Strange 882, Raymond, C. J.,

> "It is a point not to be disputed but that in criminal cases the principal is not answerable for the act of the deputy as he is in civil cases; they must each answer for their own acts, and stand or fall by their own behavior. All the authors that treat of criminal proceedings proceed on the foundation of this distinction: that to affect the superior by the act of the deputy, there must be a command of the superior".

If with my guilty participation another commits a crime, understanding he is doing so, I am principal to that crime. If I cause him to do it, and he is innocent of, and knows not, my *mens rea*, he is my innocent agent, and I alone am guilty,—as principal. But in the latter case my act must have accomplished the completed crime. "Presence is not necessary when causal connection is immediate, e. g. when agent is irresponsible." 1 Wharton, Cr. Law (12 Ed.) Sec. 241. I must have been throughout the directing force. My innocent agent, whether an innocent human being or an insensate mechanism, must have done my bidding, and thereby accomplished the crime my *mens rea* intended. And there must be "*immediate causal connection between the instigation and the act*". 1 Wharton, Cr. Law (12 Ed.) Sec. 265. And the innocent agent must not have committed some crime other than I instigated; and neither am I guilty if what I directed *results*, in consequence, in some *other*, or different, crime. Whart. Crim. Law, supra. If I, designing to steal shopkeeper Schmidt's jewels, send my little grandson, or secretary, to Schmidt's shop with direction to pick up there, and fetch to me at my office, a certain red plush jewel case, and he innocently obeys and executes my direction, and I thus appropriate Schmidt's

jewels, I, but I alone, am guilty of the theft. I alone cause and accomplish the larcency. This is "intended causation", as expressed in the "innocent agent" doctrine. Or, if my emissary be my confederate, and share my *mens rea*, we are both guilty, as principals. If my guilty confederate commit the act, but I, sharing the *mens rea*, aid, abet, counsel, command, induce or procure its commission, I am principal with him. But if, in *consequence* of my theft, either through my innocent agent or guilty confederate, Schmidt should commit suicide, or his partner should kill him, over the loss of the jewels, I am not guilty of murder; and no more is Giles guilty of false entries which he did not make, and was not principal to the making of, albeit his withholding of the deposit slips may, in the sequence of events, have *resulted* in the *falsity* of those entries.

Inspection of every decision which has upheld conviction for false entry under this statute, where the accused was not himself the entrant, will make plain the fact that he was principal with the entrant or else sole principal. In the Morse case, which, as is manifest from the fact of Petitioner's reliance on it, marks the high tide of what we may term "construction" of the statute, Morse was principal to the entrant. He was executive officer and active head of the bank, his secretary and the bookkeeper directly under his control. It was in furtherance of his own scheme to defraud and conceal, and at his own direction, the false entries were made. He had the secretary execute a sham note, and the bookkeeper to enter the transaction as a loan, when in fact it was, as he knew, a speculative purchase of stocks, in violation of law. He planned and directed the whole transaction and it was by his express procurement and direction the false entries were made. The court said, since he did not make the entry, it must have been made

by his *direction* and procurement,—which the jury, on what was held to be sufficient evidence, found it was. He was clearly principal.

In the Richardson vs. United States, 181 Fed. 1 cited by the Government, accused cashier directed his clerk to make the entry. The court found the entrant in making the entry, to have been "acting under the direction of the defendant," he was principal.

Most of the decisions, where the accused was not the actual entrant, expressly rest the affirmance on the ground the accused was principal,—such, for instance, as the cases of Kettenbach vs. United States, 202 Fed. 377; United States vs. Fish, 24 Fed. 585. In some cases, as for instance Scott vs. United States, 130 Fed. 429, perhaps with less care, in referring to the facts showing principalship, the courts quote the familiar maxim, *qui facit per alium facit per se*. This maxim is but the *fundamental principle of civil agency*. It is not a doctrine. It is but a short and familiar way of expressing, so far as criminal law is concerned, the fact of principalship,—that the accused procured the entry to be made, or act to be done, and is, hence, principal to its commission. A bank president devises a fraudulent scheme, puts through, by the use of sham documents a false transaction, and causes his underling, the bookkeeper, to make the entry on the books. We may, a bit carelessly, apply the terse latin maxim; but we *should* more accurately say, in referring to criminality, he is *principal*.

We respectfully suggest that, since Respondent did not make these entries, he must be shown, and held, to have been principal to their making, else the conviction cannot stand,—that the law affords no other vehicle which will

uphold or convey to him the crime of him who actually did it.

It will be unnecessary to argue to this court, what is too fundamental to require discussion, that Giles is not, in law, a principal with the entrants in this case in the sense of having aided, abetted, counseled, commanded, induced or procured the entrant to make the entries. To contend that he was so would be to reflect on the intelligence of the criminal lawyer. In the first place, it is not claimed, and cannot be, that the entrants were themselves guilty of the offense. This fact alone wipes out all principalship, except the innocent agent doctrine, where the accused must be sole principal. This was doubtless true in the Richardson case, supra, where the court said the entrants *may* or *may not* have acted with guilty knowledge, but that the case did "not turn upon that point", as in either event Richardson would be guilty,—as having directed and acted with the entrants, if they were guilty, as having solely accomplished the crime, and had immediate causal connection with it, if they were innocent.

With the innocent agent doctrine understood, it would appear equally unnecessary to argue that Giles is not guilty of the false entries as the directing force in, as having himself accomplished, the making of the entries. It is unnecessary to say, Giles did not in fact "instigate" the making of the entries in question, much less that there was *no immediate causal connection* between his withholding of the slips in his possession and the making of the entries, induced by other independent causes. What was said at the beginning of this discussion manifests that whatever may be said of Giles' withholding having, in the sequence of events, conduced to the entries later made *being false*, his act did

not *cause the making* of the entries themselves. To hold him guilty, under this statute, of *making* the false entries, we would have to shut our eyes to the facts, and to all principles on which the law of Principals, in the innocent agent doctrine, operates, and say, against undisputed fact, that his act was the directing force throughout in the actual *making* of the entries (regardless of the fact of their falsity); that he was solely the directing force in making the entries; that there was *immediate causal connection* between his withholding the slips,—which looked only to preventing entries—and the subsequent independent making of the entries by persons he in no degree directed, but who in fact made them as a result of the customers balances having been changed from causes wholly foreign to and outside of the negative act of Giles, which contributed not one whit to the making of the entries, but only to their incorrectness, or falsity, when later made, and which were made *despite his act* looking solely to the *prevention* of the entry.

The fallacy, we repeat, in the arguments for petitioner lies in the fact the reasoning is applied to the wrongful character of respondent's act in withholding the slips, rather than to what the statute penalizes, and to proper construction of that statute. One may conceive a variety of acts by bank officials and employees, which may result in false entries, which are not punishable under this false entry statute,—

> "gross maladministration and inexcusable breach of duty on the part of its officers in the management of a national bank, however disastrous such conduct may be to its stockholders, are not punishable unless they come within the provisions of Section 5209 of the

Revised Statutes (U. S. Comp. St. 1901, p. 3497). The Supreme Court, in United States v. Brewer, 139 U. S., at page 288, 11 Sup. Ct. 541 (35 L. Ed. 190), though alluding to another enactment, announced the applicable principle when it said that 'Before a man can be punished his case must be plainly and unmistakably within the statute.'" Prettyman vs. United States, 189 Fed. 30, 34.

The error of Petitioner's arguments may be variously shown:

1. They overlook, what is obvious and well decided, that the penalty imposed, the thing punished, by this statute is the *making* of the entry,—the making itself, not the doing of, or omission to do, some act which may *result in rendering false* an entry subsequently and independently made by another, the entry itself being caused or induced by independent acts,—nor even the doing of an act which may *conduce* to, *or result in*, the making of the entry itself by another,—which latter, however, Giles did not do, as we have seen.

2. They go on the false premise the act of Giles "in deliberately withholding" the deposit slips is an "affirmative act", within the meaning of those well considered decisions which hold the accused must have acted affirmatively in directing the entrant in the making of the entry. This latter erroneous assumption was what misled the trial court in his charge. Giles' "affirmative act" of placing the deposit slips in the cigar box, withholding them from the depository where one from the bookkeeping department would have gotten them and carried them to the bookkeepers, and who would in turn have entered them on the ledger, was *not* an affirmative act, in the sense of the

principle which requires his act to have been an affirmative one in the way of directing the entry. To the contrary, the withholding of the slips was but a negative act. It had no *affirmative relation* to the making of the entries. It is a gross misconception to say this was tantamount to an affirmative direction to the bookkeeper. It was the omission, the declination, the refusal, to say anything to, communicate with, or direct, the bookkeepers. It was but an omission, a failure, to do what he should have done. As well might it be said had Giles gone to sleep at his desk, and thus failed to place the slips in the drawer where they would be gotten by the bookkeepers, he had thereby "affirmatively directed" the hand of the bookkeepers in making the false entires. To insist that Giles' act was affirmative amounting to a direction to the bookkeepers to make the false entries, is to reverse what Giles did. And to argue in the next breath that even if conceded to be an "act of omission", it amounted to an intentional causing of the entries to be made, and then to say this would not be true in case of accident, neglect, or unintended causation, is indeed the height of sophistry. The reasoning is palpably wrong. What Giles did was negative, not affirmative, omission, not commission, in relation to making the entries, and looked to preventing, not to making, and could by no possibility have caused the *making*, of the entries.

3. The argument erroneously assumes the withholding of information, which would prevent entry as the result of the withholding, was the *making of the entry*. In its worst possible light, it related and conduced only to *the falsity* of entries, if and when, through independent cause, they should be subsequently and independently made by others. We repeat, in view of the subsequent withdrawals and deposits, the bookkeepers would have *made their entries*

whether Giles *reported or withheld* the slips he had. They would have made their entries if the deposits had not been made; or if Giles had lost his slips, or forgotten the fact of the deposits, or fallen asleep and failed in his duties; or if another had stolen the slips from the drawer after Giles had placed them there; or if for any other conceivable reason the slips had failed to reach the bookkeepers. Of necessity, therefore, the entries were made independent of Giles and of any act of his, and without relation to the fact his omission conduced to their falsity. In short, Giles' act, in the sequence of events, and in view of the acts of others depleting and changing the balances, which caused the entries, did no more than to conduce to their *falsity* when finally, independently made, and to the making of which he was not party or principal, and to this only. But the offense lies in the *making* of an entry which is false, *not* the *rendering false* an entry to be made by another. If this were not so, an employe who should embezzle whatever sum during the business day, and thereby in a series of sequences render false an entry later independently to be made by a bookkeeper, in entering the amount of cash on hand at close of business, would be guilty of false entry,— and this notwithstanding he had neither contact with, direction of, nor anythig to do with, the bookkeeper who should make the entry. A purloining porter, who should steal a dollar from the cash, thus committing, and thinking only of committting, embezzlement (or theft by bailee) in taking the dollar, thus causing the bank's cash to be out of balance, must report his petty theft to the bookkeeper, and tell the latter to deduct the dollar when he goes to make his entry, else the porter would, by this remarkable doctrine of imputed principalship, have *made* a false entry. This would indeed be an absurdity sanctioned neither by rule

nor reason. This would be to read into the statute a provision it does not contain. Before such could be the case Congress would have to amend the statute to read in substance, that "whoever commits any act which may result in any entry thereafter made by another in the books of the bank being false, whether the entry itself be made by his procurement or not, shall be guilty of making false entry". Unfortunately for Petitioner, our statute in question is quite unlike, and falls far short of, the English statute construed in Reg. vs. Butt, 15 Cox C. C. 564, where Lord Coleridge, for the court, affirmed conviction of a clerk who collected one sum, and reported a lesser,—under a statute which makes him guilty of false entry who makes, or concurs in making, a false entry, or *omits* or alters, or *concurs in omitting* or altering, any entry, etc. The court said there it was immaterial the clerk was innocent of the falsity of the entry, as the prisoner either made or took part in the making of it, for sum materially less than he collected. There the statute expressly covered the *omission, and* the act of the accused was *affirmative*,—he was principal.

The illustrations given, and authorities cited, by the earnest dissenting Judge below, while plausible, are easily to be distinguished in principal and application. His premise, we respectfully submit, that "an omission to prevent a foreseen consequence which there is a legal duty to prevent may charge one criminally with that consequence", is, as applied to the facts here, faulty in two main respects:

(1) Giles *owed no legal duty* to *prevent false entry* from being made *by the bookkeepers*. The bookkeepers were not under his care nor direction, and the making of entries by them was none of his business. He owed the duty

to his employer to perform the duties of his employment. He owed a duty to put the deposit slips in question into the drawer whence they would reach the bookkeepers. That was the extent of his duty; and he failed in that duty. No statute penalizes that failure. But his duties did not comprehend that of preventing the bookkeepers from making false entries.

> "The bare neglect of a legal duty is not a crime unless some statute so prescribes". People vs. Watson, 154 Misc. 667, 278 NYS 759, 762.

A brakeman on a train was held not liable for the death of a child because he did not owe the duty, since the engineer and fireman held those duties. Anderson v. State, 27 Tex. App. 177, 182-3.

In Regina v. Conde, 10 Cox C. C. 547, the accused were guilty of murder in withholding food with wilful determination to thereby cause death; also their act in withholding *itself* accomplished, and necessarily accomplished, the very effect and end they sought,—the crime they solely committed, namely, murder. Similarly, in Regina v. Instan, 1 Q. B. 450, the circumstances created the legal duty to supply the food: and the withholding thereof directly accomplished the death. In each case there was *direct, immediate causal* connection,—the *acts of the accused*, in each case, accomplished the completed crime. The accused in each case were the immediate and sole directing force which accomplished the end conceived and intended in their *mens rea*. So it was in the Knowles case where the sea captain was claimed by the prosecution to have wilfully sailed away from the seaman who had fallen overboard, refusing effort to save him. What the Govern-

ment there was trying to establish was that this action of the captain directly caused, had immediate causal connection with, death, and was, hence, manslaughter. The contention may have been a bit farfetched, in the circumstances, and the jury evidently thought so. But the Government would have had no case to contend for had it been plain, as here, that the captain owed no duty to prevent the death, or that his act had no immediate causal connection with the death,—that there would have been no death but for the fact that other independent actors appeared on the scene and did the thing which caused death.

Nothing, either, in the sections of Wharton's Criminal Law, cited in the dissenting opinion, supports the conclusions there reached. On the contrary, the author there recognizes, and in his Section 265, quoted supra, adds pertinent caution to enforce the recognition, that there *must be* "immediate causal conection between the instigation and the act". He illustrates the point by the example that one is not responsible when causation is broken by the act of another. Here the withholding of the slips by Giles utterly lacked causation, so far as the making of the entries was concerned, and as well causation arose from other independent causes in which Giles had no part and over which he exercised no control.

(2) It is not true, in the light of the facts, that the making of a false entry was foreseen or was "a foreseen consequence" of Giles' withholding the slips. This is manifest from what we have hereinabove said. He knew his withholding would not cause an entry, because it suppressed the necessity, so far as the slips he withheld, were concerned, until he should turn them in; and to say, as

matter of law, that he foresaw that checks would be drawn against the account, or that other deposits would be made, before he could later turn in the slips, not only leaps beyond all proved fact, but both ignores causal connection and assumes against, and without, fact. No wonder the able author of the majority opinion and his concurring associate could not be led so far.

Again, wherein the dissenting Judge concluded the withholding of the slips was "purposeful, affirmative action", he misconceived the state of the testimony which showed the act of Giles, in withholding the slips had no affirmative relation to the making of the subsequent entries by the bookkeepers, but that the entries were made entirely without regard or relation to Giles' withholding, and from wholly different causes. This we have attempted to make clear hereinabove. It might be added had Giles changed or altered the deposit slips, after receiving them, and reported part only of one or both of the deposits, his would have then been affirmative action,—though grave doubt may even then be entertained whether it could be said he had made, or caused to be made, the entries. But at all events, what is overlooked in the minority opinion, the difference between inaction, or nonfeasance, and affirmative action causing the entries, is just the difference which makes one principal, or non-principal, to a crime.

One cannot be convicted of making false election return where he omitted to make return. Banner vs. State 44 Tex. Crim. Rep. 42.

Mere failure to disclose a fact does not constitute false pretense. There must be some affirmative misrepresentation,

by word or conduct. Tucker vs. State 170 Ark. 143. Blum vs. State, 20 Tex. App. 578, 592-595.

While no principle allows that the entrants here were agents of respondent, yet if we might so presume, that is not sufficient. Conceding the entrant to be an agent, yet

> " - - when made by an agent, they must be directly authorized or consented to in order to hold the principal, for authority to do a criminal act will not be presumed. 1 McLain, Crim. Law, Sec. 683. If a principal is liable at all criminally for the acts of another, such liability must be founded - - upon authorized acts". People vs. Green, 22 Cal. App. 45.

It is impossible to say that Giles' mere withholding of the slips had any immediate causal connection with, or accomplished the completed act of, making the entries with which he is charged,—to say he is principal, sole principal, to the making of these entries by the innocent bookkeepers: and we may be pardoned expression of the thought that to go so far afield would not only be to extend by construction a statute so plain and unambiguous as not to require nor admit of construction, but would be violative of all those great principles variously applying the rule of strict construction, above quoted, and the departure far more evil in its consequences than was the act of Giles which the prosecutor would have us extend this statute to include. If the claimed "lacuna", or "loophole" result, under the test of safe and established principles of construction, then, in the language of this court, "Congress alone can supply the omission", and application should be made there, not to this court.

We cite the following authorities, in particular, to support our position for respondent:

U. S. C. Title 12, Sec. 592;
U. S. C. Title 18, Sec. 550;
United States v. McClarty, 191 Fed. 523;
United States v. McClarty, 191 Fed. 518;
United States v. Herrig, 204 Fed. 124;
United States v. Booker, 98 Fed. 291;
Twining v. United States, 141 Fed. 41;
State v. Asal, 79 Mont. 385, 256 Pac. 1071, 1081;
United States v. Eqe, 49 Fed. 852, 853.

The decisions in the two McClarty cases, supra, are admitted by our esteemed adversaries to be in point, and to directly support our position. Your Honors will desire to read them with care for yourselves; and we shall not consume space to quote nor argue them here. The venerable District Judge who wrote those two decisions obviously gave the subject most earnest and exhaustive consideration. His conclusions there undoubtedly, in effect, are that the acts of respondent here are not within this false entry statute, and that to "hold otherwise, we must insert a clause in the statute which Congress omitted". If the venerable Judge Evans, instead of opinions extending through 200 volumes of our Federal Reports, had written but those in the two McClarty and Prettyman cases, they must have stamped him as a great lawyer and just judge. From all the American and English jurisdictions, Petitioner presents no case which supports its contention.

We respectfully submit that the Circut Court of Appeals was correct in reversing the judgment, and holding that the act of respondent is not made penal by, and his case therefore is not within, the statute.

Our thought throughout has been, and is, in reference to the sufficiency of the indictment, the phrase "caused to be made", may be treated as surplusage; that inasmuch as the statute, by express terms makes only him guilty who makes the false entry, an indictment should merely aver that an accused indicted under that statute made the false entry; and even though the Government might be unable to prove that the accused actually made the entry, if it succeeds in proving him to be a principal with the entrant, the case will have been made against him. Though foreign to our point, we deem it proper to state to the Court our view on that subject.

We cannot fail to conclude that respondent did not make the entries; that what he did did not cause them to be made; that he is not principal, either under the terms of our principal statute nor as having caused the innocent bookkeeper to make the entries; and in the state of the statute his conviction cannot stand.

For respondent, we respectfully pray that the judgment of the Circuit Court of Appeals be affirmed.

NAT L. HARDY,
WILL A. MORRISS,
of San Antonio, Texas,
Attorneys for Respondent.

Jan., 1937.